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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1972

No. 72-285

G. DOUGLAS & MARY TIBBITTS, Bankrupts, *Petitioners*
VS.
JAMES E. CUSSEN, Trustee, *Respondent*

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent Security Pacific National Bank, heretofore Bank of Sacramento, ("Security Pacific") a secured creditor herein, opposes petitioners' Petition for a Writ of Certiorari as follows:

PRELIMINARY STATEMENT

Initially Security Pacific submits the following by way of clarifying some of the more glaring inaccuracies contained in petitioners' statement of the case:

Petitioners recite that the assets of the estate were valued between $300,000 and $600,000. No one other than the petitioners have ever placed such a value on the assets of the estate and in fact all unsecured

creditors fully recognized that the assets were insufficient to satisfy the claim of the single secured creditor, now Security Pacific. Petitioners also state that the unsecured creditors were overwhelmingly in favor of the plan. For good reason: The plan attempted to arrange the secured indebtedness, which is not allowable under the provisions of Chapter XI of the Bankruptcy Act. Accordingly, the secured creditor "vigorously" and properly objected to the plan. Obviously the unsecured creditors were in favor of such a plan since it would be the only way that they could ever hope to receive any repayment from the petitioners.

ARGUMENT

Security Pacific submits the following reasons and authority in opposition to the issuance of the Writ of Certiorari as prayed for:

1. **Neither of the questions presented in their petition to this Court was raised before the referee in bankruptcy; neither was the subject of a petition for review; neither was presented to the United States District Court at the time of the hearing de novo held by it.**

The questions presented here by petitioners involve the statutory and constitutional validity of the notice given by the Referee in Bankruptcy in this matter. These questions were first raised by the petitioners when they were before the United States Court of Appeals for the Ninth Circuit. At the times involved, that is when this action was before the Referee in Bankruptcy, petitioners had other counsel who is

entirely familiar with the practice in Sacramento and who, accordingly, did not advance these arguments to the Referee. When the petition to review the Referee's Order was filed with the United States District Court, petitioners again failed to raise these questions (see Appendix) and accordingly it has been waived. *Stouper v. Jones,* 284 F.2d 240 (D.C. Cir. 1960). Obviously, since the subject was not contained in the petition for review it was not considered by the United States District Court at the hearing de novo conducted by it with respect to such petition.

Finally, as is indicated by the decision of the United States Court of Appeals for the Ninth Circuit in petitioners' appendix, this was one of the bases for its decision. The Court states "The objection as to adequate notice to the bankrupts and creditors was not raised below".

2. Moreover, the questions are of absolutely no substance since whatever error might have been committed was entirely cured by the full hearing de novo held before the United States District Court with notice to all parties.

The hearing of the petition for review by the United States District Court took the form of a hearing de novo *with notice to all parties* resulting in the Court not only affirming the Referee's Order but making its own findings of fact and conclusions of law based upon the evidence produced before it by the parties. A full and complete hearing was conducted with respect to the question of the feasibility of the plan and the Court found, as did the Referee, that it was clearly unfeasible. Accordingly, whether or not the notice of

hearing before the Referee on the question of dismissal or adjudication was sufficient, the United States District Court *issued its own notice* and made its own independent finding of unfeasibility and concluded that the petitioners should be adjudicated bankrupts.

CONCLUSION

Respondent Security Pacific National Bank prays the Court deny petitioners' Petition for a Writ of Certiorari.

Dated, Sacramento, California,
September 11, 1972.

Respectfully submitted,
OTTO ROHWER,
DOWNEY, BRAND, SEYMOUR & ROHWER,
Counsel for Respondent Security Pacific National Bank, Secured Creditor herein.

(Appendix Follows)

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Attorneys for Debtors and Petitioners

In The District Court Of The United States
In And For The Eastern District Of California

BK-S-6610-P

IN PROCEEDINGS FOR ARRANGEMENT UNDER CHAPTER XI OF THE BANKRUPTCY ACT

In the Matter of
G. Douglas Tibbitts and Mary Tibbitts (Valley Newspaper Advertising and Public Relations and Tibbitts Publications),
Debtors.

PETITION FOR REVIEW

To the Honorable Sherrill Halbert and Thomas J. MacBride, Judges of the United States District Court in and for the Eastern District of California:

The petition of G. Douglas Tibbitts and Mary Tibbitts, respectfully represents:

1. Your petitioners are aggrieved by the Order herein of Bryte M. Peterson, Referee in Bankruptcy, dated April 23, 1969, a copy of which Order is annexed hereto, marked Exhibit "A" and made a part hereof.

2. The Referee erred in respect to said Order in that the Referee failed and refused to grant a continuance of all proceedings on April 23, 1969, as requested by debtors for good and sufficient reason, namely the sudden illness of Mary Tibbitts, one of the debtors, and the pendency of a petition in review before the United States District Judge of an issue of substance and crucial to the entire arrangement proceedings then pending in this Court.

3. The Referee erred in respect to said Order, in that the Referee finds that the arrangement is not for the best interest of creditors and further that it is not feasible.

4. The Referee erred in respect to said Order in finding that the debtors are guilty of acts and have failed to perform duties which would be a bar to their respective discharge as a bankrupt.

5. The Referee erred in respect to said Order in finding that the debtors have no prospects for rehabilitation.

Wherefore, your petitioners pray that said Order be reviewed by a judge in accordance with the provisions of the Bankruptcy Act, that said Order be reversed, that the Chapter XI Arrangement Proceed-

ings go forward and that your petitioners have such other and further relief as is just.

Dated, May 7, 1969.

/s/ G. Douglas Tibbitts
G. Douglas Tibbitts
/s/ Mary Tibbitts
Mary Tibbitts

Dahl, Hefner, Stark & Marois
By Loren S. Dahl

United States of America
State of California
County of Sacramento ss.

We, G. Douglas Tibbitts and Mary Tibbitts, the debtors and petitioners named in the foregoing Petition for Review, do hereby make solemn oath that the statements contained herein are true according to the best of our knowledge, information and belief.

/s/ G. Douglas Tibbitts
G. Douglas Tibbitts
/s/ Mary Tibbitts
Mary Tibbitts

Subscribed and sworn to before me
this 9th day of May, 1969.

Loren S. Dahl
Notary Public in and for said
County and State

My Commission Expires:

Filed May 7, 1969,
Referee in Bankruptcy.

EXHIBIT "A"

In the District Court of the United States
In and for the Eastern District of California

No. BK-S-6610-P

IN PROCEEDINGS FOR ARRANGEMENT UNDER CHAPTER XI OF THE BANKRUPTCY ACT

In the Matter of
G. Douglas Tibbitts and Mary Tibbitts (Valley Newspaper Advertising and Public Relations and Tibbitts Publications),
Debtors.

ORDER REFUSING CONFIRMATION AND DISMISSING PROCEEDINGS ADJUDICATING DEBTORS BANKRUPTS, AND DIRECTING THAT BANKRUPTCY BE PROCEEDED WITH

At Sacramento, in said District, on April 23, 1969.

The application of G. Douglas Tibbitts and Mary Tibbitts, the above named debtors, for confirmation of the arrangement under Chapter XI of the Bankruptcy Act, proposed by said debtors in the petition filed by them on May 2, 1968, having been heard and duly considered; and due notice of said hearing hav-

ing been given by mail to all persons entitled thereto; and the Court not being satisfied that the arrangement is for the best interest of the creditors or is feasible; the Court being further satisfied that the debtors are guilty of acts and have failed to perform duties which would be a bar to their respective discharge as a bankrupt; and, the Court further being satisfied that the debtors have no prospects for rehabilitation;

Now upon all the proceedings had before me and due deliberation having been had thereon; it is

Ordered that confirmation of said arrangement be, and it hereby is, refused; and it is further

Ordered that the proceedings commenced by the filing hereon on May 2, 1968, of the debtors' petition under Section 322 of said Act proposing an arrangement under Chapter XI of said Act be, and it hereby is, dismissed; and it is further

Ordered that the debtors be, and each of them are, hereby adjudicated bankrupts, and that bankruptcy be proceeded against them, and each of them, pursuant to the provisions of said Act.

Bryte M. Peterson
Referee in Bankruptcy

Filed April 23, 1969,
Referee in Bankruptcy.

MAY 23 [illegible] CLERK

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

In the Matter of G. DOUGLAS and MARY TIBBITS, Bankrupt, Appellants, vs. JAMES E. CUSSEN, Trustee, et al., Appellees.	No. 25,814 ORDER DENYING PETITION FOR REHEARING

Before: CHAMBERS and TRASK, Circuit Judges, and MURRAY, District Judge.

The petition for rehearing is denied.

A TRUE COPY
ATTEST: SEP 14 1972
, Clerk
, Deputy